

# Sex Discrimination Amendment (Exemptions) Regulation 2016

## EXPLANATORY STATEMENT

Issued by the Attorney-General  
in compliance with section 116 of the *Sex Discrimination Act 1984*

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### INTRODUCTION

This Regulation was made under section 116 of the *Sex Discrimination Act 1984* (the Act) and is a legislative instrument for the purposes of the *Legislation Act 2003* (the LA).

### OUTLINE

Section 116 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

In 2013, the Act was amended by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* to provide protection against discrimination on the basis of sexual orientation, gender identity and intersex status. At the same time, subsection 40(2B) was inserted to provide an exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation (section 5A), gender identity (section 5B) or intersex status (section 5C) if the conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

All Commonwealth, state and territory laws in force at 1 August 2013 were initially prescribed by regulation 5 of the *Sex Discrimination Regulations 1984* (Sex Discrimination Regulations) until 31 July 2014, to allow time for jurisdictions to review their laws and assess compliance with the new protections against discrimination.

A review of Commonwealth laws found these laws are able to operate consistently with the new protections against discrimination on the grounds of sexual orientation, gender identity or intersex status. Consequently, no Commonwealth laws have been prescribed since 1 August 2014.

To allow states and territories additional time to review their laws, regulation 5 was amended by the *Sex Discrimination Amendment (Exemptions) Regulation 2015* to extend the sunset date applying to the prescription of all states and territories' laws to 31 July 2016.

The Regulation prescribes two specific Western Australian laws until 31 July 2017:

- *Human Reproductive Technology Act 1991* (WA), and
- *Surrogacy Act 2008* (WA).

The effect of prescribing the Western Australian laws in the Regulation is that actions taken in direct compliance with the Human Reproductive Technology Act and Surrogacy Act would not be unlawful discrimination on the grounds of sexual orientation, gender identity, or intersex status. The purpose of this prescription is to facilitate the review and amendment of these Acts by Western Australia.

The Commonwealth Government does not propose to further prescribe any state and territory laws after 31 July 2017.

## **PROCESS BEFORE REGULATION WAS MADE**

### **Regulatory impact analysis**

Before this Regulation was made, its expected impact was assessed using the Preliminary Assessment tool approved by the Office of Best Practice Regulation (OBPR). That assessment indicated that it would have no or low impact on business, individuals and the economy. This assessment has been confirmed by the OBPR (OBPR reference 21052).

### **Statement of compatibility with human rights obligations**

Before this Regulation was made, its impact on human rights was assessed using tools and guidance published by the Attorney-General's Department. It is fully compatible with human rights as defined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Consultation before making**

Before this Regulation was made, the Attorney-General considered the general obligation to consult imposed by section 17 of the LA.

The introduction of subsection 40(2B) into the Sex Discrimination Act by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* was the subject of an inquiry by the Senate Legal and Constitutional Affairs Legislation Committee. The Committee handed down its report in June 2013.

This Regulation extends the sunset date for the prescription of two specific Western Australian Acts for a further period until 31 July 2017. The decision to extend the sunset date follows consultation with Western Australia.

### **Statutory preconditions and Parliamentary undertakings relevant to this Regulation**

There are no other statutory preconditions or Parliamentary undertakings relevant to the making of this Regulation.

## **PROCESSES FOR REVIEW OF THIS REGULATION**

This Regulation is subject to tabling and disallowance under Chapter 3 of the LA.

## **OTHER ISSUES**

### **Matter incorporated by reference**

This Regulation does not apply, adopt or incorporate other matter by reference.

### **More information**

A provision by provision explanation of the Regulation is provided in [Attachment A](#).

**Section 1 Name of Regulation**

This section provides for the Regulation to be named as the *Sex Discrimination Amendment (Exemptions) Regulation 2016*. The Regulation may be cited by that name.

**Section 2 Commencement**

This section provides for the Regulation to commence on the day after it is registered on the Federal Register of Legislation. This is the day that would apply under subsection 12(1) of the LA, if no commencement provision were made.

**Section 3 Authority**

This section identifies the Act that authorises the making of the Regulation.

**Schedule 1 – Amendments****Item 1 – Section 5 – Exemption for things done in direct compliance with prescribed laws**

Subsection 40(2B) of the *Sex Discrimination Act 1984* provides an exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation (section 5A), gender identity (section 5B) or intersex status (section 5C) if the conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

This item repeals the existing spent section 5, which expired on 31 July 2016. This item substitutes a new section 5 that prescribes two Western Australian laws:

- *Human Reproductive Technology Act 1991* (WA), and
- *Surrogacy Act 2008* (WA).

The effect of this item is that anything done by a person in compliance with the prescribed Western Australian laws is not unlawful discrimination under sections 5A, 5B and 5C of the Sex Discrimination Act. The prescription of the Western Australian laws would expire on 31 July 2017.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Sex Discrimination Amendment (Exemptions) Regulation 2015***

#### **Overview of the Amendments**

In 2013, the *Sex Discrimination Act 1984* was amended to provide protection against discrimination on the basis of sexual orientation, gender identity and intersex status. At the same time, new subsection 40(2B) was inserted to provide an exemption for conduct that would otherwise be discrimination on the grounds of sexual orientation (section 5A), gender identity (section 5B) or intersex status (section 5C) if the conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

All Commonwealth, state and territory laws in force at 1 August 2013 were prescribed for an initial period of one year to allow time for the Commonwealth, states and territories to review their laws to assess whether they comply with the new protections against discrimination.

In 2014, a review of Commonwealth laws found that these laws are able to operate consistently with the new protections against discrimination on the grounds of sexual orientation, gender identity and intersex status. Consequently, Commonwealth laws have not been prescribed since 1 August 2014.

In order to allow states and territories time to complete a review of laws for consistency with the new grounds of protection, the initial 12 month prescription of all state and territory laws was extended until 31 July 2016. During this time, a working group of Commonwealth, state and territory officials progressed this review of laws. Western Australia has requested that the prescription be extended for a further period for two Western Australian Acts, to allow time for further assessment of those laws.

This Legislative Instrument amends the *Sex Discrimination Regulations 1984* (Sex Discrimination Regulations) to extend the prescription of two Western Australian Acts for a further period until 31 July 2017:

- *Human Reproductive Technology Act 1991* (WA), and
- *Surrogacy Act 2008* (WA).

#### **Human rights implications**

The amendments engage the right to equality and non-discrimination.

##### ***The right to equality and non-discrimination***

By extending the prescription of two Western Australian laws for a further period, the amendments to the Sex Discrimination Regulations engage the right to equality and non-discrimination in articles 2 and 26 of the *International Covenant on Civil and Political Rights* and article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*.

The right to equality and non-discrimination provides that all persons are equal before the law and entitled, without any discrimination, to the equal protection of the law. As a result, laws should prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'. The United Nations Human Rights Committee has found that 'other status' includes sexual orientation.

The right to equality and non-discrimination is subject to the international human rights law principle of 'legitimate differential treatment'. This principle allows particular groups of people to be treated

differently where the treatment is aimed at achieving a legitimate objective, is based on reasonable and objective criteria and is proportionate to the objective to be achieved.

When the new protections against discrimination on the grounds of sexual orientation, gender identity and intersex status were put in place in August 2013, all Commonwealth, state and territory laws were exempted for an initial 12 month period until 31 July 2014 through prescription in regulation 5 of the Sex Discrimination Regulations.

A review of Commonwealth laws found that these laws are able to operate consistently with the new protections against discrimination on the grounds of sexual orientation, gender identity or intersex status. Consequently, no Commonwealth laws have been prescribed since 1 August 2014.

The prescription of state and territory laws was most recently extended until 31 July 2016 to allow states and territories additional time to review their laws for consistency with the protections from discrimination on the new grounds. The Legislative Instrument extends the prescription of two specific Western Australian Acts (the *Human Reproductive Technology Act 1991* (WA), and *Surrogacy Act 2008* (WA)) for a further period, until 31 July 2017. This means that anything done by a person in direct compliance with those Acts will be exempted from the protection from discrimination on the grounds of sexual orientation, gender identity or intersex status in the Sex Discrimination Act during this period.

Western Australia has indicated that a further extension of time is required to facilitate the amendment of the Human Reproductive Technology Act and Surrogacy Act. The amendment is therefore aimed at achieving the legitimate objective of providing additional time for Western Australia to amend laws to ensure consistency with the new grounds of protection against discrimination.

The limitation is based on reasonable and objective criteria as it only extends two prescribed laws in force at 1 August 2013, which ensures any laws passed after that date must comply with the existing protections from discrimination on the grounds of sexual orientation, gender identity and intersex status. The limitation is proportionate as it is for a short time period, and no more restrictive than required. A period of less than 12 months may not be sufficient to allow Western Australia time to amend its laws. The Government does not propose any further extensions of this exemption after 31 July 2017.

## **Conclusion**

The Legislative Instrument is compatible with human rights because the limitations it places on the right to equality and non-discrimination are reasonable, necessary and proportionate to achieving a legitimate aim.